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No. 85-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LONG-AIRDOX COMPANY, DIVISION
OF THE MARMON GROUP, INC.,
Petitioner,

v.

MELVIN KESSLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Fayette County, West Virginia

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner, the Long-Airdox Company, Division of the Marmon Group, Inc. (hereinafter "Long-Airdox" or "the Company") respectfully submits this supplemental brief in support of its petition for certiorari.

ARGUMENT

THE RECENT DECISION OF THE SEVENTH CIRCUIT IN *NATIONAL METALCRAFTERS v. McNEIL* IS IN DIRECT CONFLICT WITH THE DECISION BELOW

In its Petition for a Writ of Certiorari ("Petition"), Long-Airdox asserts that the decision of the West Virginia court merits review because it misapplied fundamental pre-emption principles established by this Court, thereby endangering collective bargaining between employers and labor organizations subject to the National

Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* The decision also impedes uniform application of federal law regarding collective bargaining agreements derived from Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. The need for review is underscored by a recent decision of the U.S. Court of Appeals for the Seventh Circuit, *National Metalcrafters v. McNeil*, Case No. 85-1263 (7th Cir. Feb. 26, 1986), which is in direct conflict with the decision below.[1]

In *National Metalcrafters*, the Seventh Circuit rendered a decision in a case virtually identical to the instant proceeding, but reaching conclusions regarding pre-emption under the NLRA and LMRA directly contrary to those reached by the West Virginia court. This direct conflict between a federal court of appeals and the West Virginia state courts on significant pre-emption issues provides additional compelling support for granting the petition for certiorari in the instant case.

In *National Metalcrafters*, the Seventh Circuit decided whether the Illinois Wage Payment and Collection Act ("Illinois Wage Payment Act"), Ill. Rev. Stat. ch. 48 ¶¶ 38m-1 *et seq.*, can "consistently with federal law, be used to order an employer to pay vacation benefits to which its workers . . . are allegedly entitled by a collective bargaining agreement." (App. at 2a). Following the expiration of the contract and a strike, the employer had altered the vacation benefits plan in accordance with a proposal it had advanced during negotiations. The Seventh Circuit ruled that the Illinois Wage Payment Act, as applied, was pre-empted both by the LMRA and the NLRA.[2]

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[1] Because the opinion of the Seventh Circuit is not yet reported, it is reproduced in the appendix to this supplemental brief.

[2] As in the instant case, the employer in *National Metalcrafters* also argued, in the alternative, that the Illinois Wage Payment Act was pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The Seventh Circuit did not resolve this issue.

A. Pre-emption Under Section 301 Of The LMRA

After first noting that "virtually every state has a wage payment act of the same general sort as Illinois', and these acts seem rich in potential for conflict with the federal labor and employee financial security laws" (App. at 2a),[3] the Seventh Circuit proceeded to describe why the Illinois Wage Payment Act, as applied, was pre-empted.

The court noted that "Section 301 of the [LMRA] creates a federal remedy for the breach of a collective bargaining agreement" and that this "remedy is exclusive; no action to enforce an agreement may be based on state law" (App. at 8a). The administrator of the Illinois Wage Payment Act, McNeil, contended that the employer had violated the statute by refusing to pay vacation benefits in accordance with the expired collective bargaining agreement between the employer and its employees' union. The Seventh Circuit unhesitatingly concluded that Section 301 pre-empted the state statute despite McNeil's effort to place the dispute outside the scope of Section 301 by arguing that the case involved statutory, not contractual rights, and that, in any event, there was no contract dispute because the contract was "unequivocal" (App. at 8a). The court pointed out that the employees' statutory rights were predicated on their contract rights and that there was at the very least "an arguable contract dispute" because there was "a gap in the language of the contract" (App. at 10a). Section 301 therefore pre-empted any state causes of action because "[i]f there is an arguable contract dispute . . . the power to resolve it is confined to . . . proceedings" under Section 301 (App. at 10a).

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[3] Another recent decision, by the U.S. Court of Appeals for the Fourth Circuit, confirms the accuracy of this observation. Although decided on a jurisdictional issue, the underlying dispute concerned a conflict between the South Carolina wage claim statute and the LMRA. *Cook v. Georgetown Steel Corp.*, 770 F.2d 1272 (4th Cir. 1985).

Significantly, the West Virginia court justified its conclusions by reasoning virtually indistinguishable from that squarely rejected by the Seventh Circuit. Thus, the court stated the West Virginia Wage Payment and Collection Act ("West Virginia Wage Payment Act"), W. Va. Code §§ 21-5-1 *et seq.*, was not pre-empted because it "intended to create rights for individual employees and not for a bargaining unit as such" (App. E to Petition at 17a). The Seventh Circuit found this purported distinction between statutory and contractual rights to be illusory. The West Virginia court also attempted to discount the significance of any contractual issues by stating that "[t]he only disagreement was the amount to be paid [*i.e.*,] the dispute was over whether payment should be made under provisions of the recently expired contract or the contract negotiated almost contemporaneously with the decision to close the plant" (App. E to Petition at 17a). Clearly, from the West Virginia court's own description of the dispute in the instant case, there was much more of a contract dispute here than the "arguable" dispute the Seventh Circuit found sufficient for pre-emption by Section 301.[4] Finally, in the most obvious conflict with the decision of the Seventh Circuit, the West Virginia court concluded that even though respondents "probably" did "have a remedy under section 301 of the LMRA", this was not their "exclusive remedy [and did not] preempt[] available state remedies" (App. E to Petition at 18a).

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[4] In their Brief in Opposition to Petition for a Writ of Certiorari ("Brief in Opposition"), respondents go beyond the lower court and refuse to acknowledge that there was any contractual dispute. But of course there was: respondents' bargaining representative insisted that the employees had only been laid off and were entitled to have their fringe benefits paid out at the rate applicable in December, 1980 under the new contract, whereas Long-Airdox's position was that the employees were terminated and should have their fringe benefits paid out immediately, at the wage rates in effect under the old contract.

Two other observations of the Seventh Circuit are especially significant and stand in sharp contrast both to the decision below and to the contentions advanced in respondents' Brief in Opposition. First, the Seventh Circuit emphasized that the Illinois Wage Act was not, as applied, a minimum state labor standard immune from pre-emption. *Cf. Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 105 S. Ct. 2380 (1985). The Seventh Circuit pointed out that the statute had not "created an entitlement that was independent of the collective bargaining contract" (App. at 10a). In the instant case, of course, Long-Airdox's obligation to pay the benefits to its former employees was entirely derived from the collective bargaining agreements. Nothing in West Virginia law requires employees to be paid "break time" or "casual day" benefits. Nonetheless, the West Virginia court thought that the statute imposed "an absolute duty" to pay the benefits on the date specified, despite any agreement to the contrary (App. D to Petition at 12a).

Second, the Seventh Circuit emphasized that this Court's recent decision in *Allis-Chalmers v. Lueck*, —— U.S. ——, 105 S. Ct. 1904 (1985), removed any doubt that the Illinois Wage Payment Act was pre-empted. *Allis-Chalmers* establishes that Section 301 governs suits asserting entitlement to contractually-derived benefits even when the plaintiffs claim to be vindicating non-contractual rights and/or insist that their reading of the contract is clear and "incontestable" (App. at 12a). *Cf.* Brief in Opposition at 13-15 (argument that *Allis-Chalmers* is distinguishable because respondents are vindicating non-contractual rights and there is no need to interpret the contract). As the Seventh Circuit put it, *Allis-Chalmers* provides "decisive support for finding pre-emption under Section 301" (App. at 13a).

B. Pre-emption Under The NLRA

The Seventh Circuit also found that the Illinois Wage Payment Act, as applied, was pre-empted by the NLRA since it attempted to regulate bargaining between the

employer and its employees' union. The Seventh Circuit stated that the statute "in effect authorizes a state official to inject himself into the bargaining process" (App. at 18a). Even more so, the West Virginia Wage Payment Act, as applied, was pre-empted by the NLRA because it represented not just an attempt to regulate collective bargaining over the payment of benefits, but was interpreted to preclude collective bargaining over the payment of benefits. Indeed, the West Virginia court specifically held that Long-Airdox could not "justify its failure to pay wages [*i.e.*, the fringe benefits] within the time prescribed by statute" because it was engaged in bargaining with respondents' Union (App. D to Petition at 12a).

In *National Metalcrafters*, the employer allegedly unlawfully altered its vacation benefits plan after the contract expired and the employees went out on strike. Such action arguably violated the NLRA, in part because the employer may have been "trying to place financial pressure on the strikers to return to work by giving them less vacation pay than they had earned" (App. at 16a). However, as the Seventh Circuit pointed out, such allegations merely buttressed the argument for NLRA preemption since conduct arguably forbidden by the NLRA "may not be regulated under state law" (App. at 14a).

Thus, the remark by the West Virginia court that Long-Airdox's conduct "may have violated both the NLRA and applicable West Virginia Code provisions" (App. E. to Petition at 17a) is anomalous since, if anything, this argues for NLRA pre-emption. So too, respondents' vehement accusation that Long-Airdox willfully withheld the benefits because it "determined to play hardball . . . in order to secure a favorable shut down agreement," Brief in Opposition at 6, actually undercuts respondents' position that the statute was not pre-empted since, if true, Long-Airdox arguably violated the NLRA.[5]

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[5] Respondents' accusations are, it should be noted, unsupported by the record. As the uncontradicted affidavits submitted by the

However, the record in this proceeding reveals that the case for pre-emption here is even more compelling than it was in *National Metalcrafters*. The West Virginia Wage Payment Act, as applied by the lower court, directly interfered with the employees' right to bargain collectively and the Company's correlative duty to bargain exclusively with its employees' designated representative. Respondents' Union urged the Company to pay the benefits at the higher wage rate that would be applicable in December, 1980; according to the West Virginia court, such negotiations over the time of payment were prohibited. Thus, this case does not involve conduct that was only arguably prohibited or protected, but rather conduct "actually protected by federal law" and, therefore, "pre-emption follows . . . as a matter of substantive right." *Brown v. Hotel & Restaurant Employees*, —— U.S. ——, 104 S. Ct. 3179, 3187 (1984).[6]

Similarly, the Seventh Circuit's distinguishing of *Metropolitan Life*, *supra*, in the context of NLRA pre-emption applies with even more force to the instant case. The Seventh Circuit found *Metropolitan Life* inapposite because the Illinois Wage Payment Act does not "set certain minimum terms of employment" but has only "created a new remedy for violations of collective bargaining agreements" (App. at 17a). In the instant case, the provision of the West Virginia Wage Payment Act at issue has likewise provided no substantive benefit since the specification of a certain date for payment of wholly

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Company to the lower court establish, the Company did not pay the benefits because it concluded that there was a conflict in its obligations under state and federal law. It decided to comply with federal law. Respondents never submitted any counter-affidavits.

[6] Respondents erroneously state that Long-Airdox maintains their cause of action is pre-empted by the NLRA because the conduct at issue was "arguably" protected or prohibited. Brief in Opposition at 8. The bargaining between respondents' Union and Long-Airdox and Long-Airdox's conduct were actually protected and mandated by the NLRA.

contractual benefits can hardly be characterized as itself a substantive benefit. But Long-Airdox's case is even stronger. In the instant case, the allegedly unlawful delay in the payment of the benefits was, or so the respondents' Union maintained, to the employees' advantage, as the benefits would then be calculated at a higher wage rate. A state statutory provision which precludes the parties to a contract from bargaining for increased benefits simply cannot be characterized as a "minimum state labor standard."

Finally, much the same can be said of the Seventh Circuit's rejection of the contention that the Illinois Wage Payment Act was not pre-empted because it " 'touches interests deeply rooted in local feeling and responsibility' " (App. at 17a; quoting *Belknap v. Hale*, 463 U.S. 491, 498 (1983)). This echoes the contention of the West Virginia court (App. E to Petition at 15a) and of respondents, Brief in Opposition at 13, that the regulation of wage and benefit payments is a "traditional concern" of state governments and therefore not pre-empted by the NLRA. The Seventh Circuit correctly observed that this contention is without merit because "[t]he potential for interference with the system of collective bargaining is too great to allow us to place this case within the 'local feeling and responsibility' exception" to NLRA pre-emption (App. at 18a).

Moreover, in a case such as the instant one, in which there was actual, and not just potential, interference with federally-protected collective bargaining, "local feeling and responsibility" is not even a factor. Where "the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the state of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.' " *Brown v. Hotel & Restaurant Employees*, 104 S. Ct. at 3187 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

Both Section 301 of the LMRA and the NLRA "express[] a strongly held policy in favor of applying uniform federal principles" to labor controversies (App. at 13a). The West Virginia court not only refused to honor this policy, but, by imposing substantial penalties on Long-Airdox, also effectively held that employers which decide to comply with federal law do so at their own peril. This elevation of state wage payment laws over conflicting federal laws, especially in light of the contrary decision of the Seventh Circuit, should be reviewed by this Court.[7]

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinions of the Fayette County Circuit Court.

Respectfully submitted,

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DATED: March 5, 1986

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[7] The substantial penalties imposed on Long-Airdox, which even the lower court conceded were "punitive" and "very harsh" (App. A to Petition at 3a), make the conflict between the West Virginia Wage Payment Act and federal labor law "all the more obvious", since "[p]unitive sanctions are inconsistent . . . with the remedial philosophy of the NLRA." *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, —— U.S. ——, 54 U.S.L.W. 4228, 4229 n.5 (U.S. Feb. 26, 1986).

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1263

NATIONAL METALCRAFTERS, a division of KEYSTONE CONSOLIDATED INDUSTRIES,
Plaintiff, Counterdefendant-Appellant,

vs.

DONALD J. MCNEIL, Superintendent, Wage Claims Division, Illinois Department of Labor,
Defendant-Appellee,
and

BETTY JOHNSON, on behalf of herself and all others similarly situated,
Intervenor-Defendants, Counterplaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 2190—George N. Leighton, *Judge.*

ARGUED DECEMBER 2, 1985—DECIDED FEBRUARY 26, 1986

Before BAUER and POSNER, *Circuit Judges,* and GRANT, *Senior District Judge.**

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* Hon. Robert A. Grant, of the Northern District of Indiana, sitting by designation.

POSNER, *Circuit Judge.* National Metalcrafters sues for a declaration that the Illinois Wage Payment and Collection Act, Ill. Rev. Stat. ch. 48, ¶¶ 39m-1 *et seq.*, cannot, consistently with federal law, be used to order an employer to pay vacation benefits to which its workers (many of whom are on strike) are allegedly entitled by a collective bargaining agreement. The federal laws alleged to preempt the wage payment act are the Employees Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Although virtually every state has a wage payment act of the same general sort as Illinois', and these acts seem rich in potential for conflict with the federal labor and employee financial security laws, few reported cases deal with these acts and none controls the issues in this case.

McNeil, the administrator of the Illinois act, ruled that National Metalcrafters had to pay its workers $115,000. Rather than pay, National Metalcrafters brought this suit. The workers intervened as parties defendant and counterclaimed under section 301 of the Taft-Hartley Act—claiming that the company's refusal to pay the vacation benefits violated the collective bargaining contract between their union and the company—and alternatively under ERISA, claiming that by failing to pay them the company had violated fiduciary duties imposed by that statute. The district judge held that the Illinois act was not preempted and entered judgment dismissing the company's suit. 602 F. Supp. 232 (N.D. Ill. 1985). The judge certified his judgment for an immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure, and National Metalcrafters has appealed.

The pendency in the district court of a counterclaim based on the same facts as the claim which the court dismissed would ordinarily preclude an immediate appeal; a judgment disposing of one of several claims is

sufficiently final to be appealable imediately under Rule 54(b) only if the claims do not have a significant factual overlap. See, *e.g.*, *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 291, reheard in part, 768 F.2d 140 (7th Cir. 1985); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir. 1984). If they do overlap, it is more economical that they be appealed together. National Metalcrafters argues that its dispute with the workers over vacation benefits cannot give rise to liability under the wage payment act because that act is preempted by federal laws; the counterclaim asserts that the dispute gives rise to liability under two of those laws. Thus the legal theories underlying the complaint and counterclaim are different but arise out of the same dispute, the same facts; and two claims are not separate for purposes of Rule 54(b) merely because one is in the complaint and the other in the countercomplaint. See *Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1378-79 (7th Cir. 1985). It is true that the complaint raises an issue of law (federal preemption) rather than of fact, but it is an issue whose intelligent disposition requires familiarity with the parties' dispute and hence with the very issues that will come before this court if and when a final decision on the counterclaim is appealed. In effect the company's suit seeks to erect at the threshold a defense to a suit against it by McNeil; and an order dismissing a defense is not an order that Rule 54(b) allows an immediate appeal from.

But there is a separate and adequate ground for the use of Rule 54(b) in this case. An order that disposes finally of a claim against one party to the suit can be certified for an immediate appeal under the rule even if identical claims remain pending between the remaining parties. *Walker v. Maccabees Mutual Life Ins. Co.*, 753 F.2d 599, 601 (7th Cir. 1985); *Banque Paribas v. Hamilton Industries Int'l, Inc.*, 767 F.2d 380, 383 (7th Cir. 1985). The judge's order in this case disposes, with

finality in the district court, of the company's claim against McNeil. He is not a party to the counterclaim. He is out of the case, and the company is entitled to a definitive resolution of its rights against him. This entitlement may benefit McNeil, though that is not a prerequisite to the appeal. He doesn't have to wait till the end of what may be protracted proceedings in the district court to find out for sure whether he is, as the district court found, not violating any rights of the plaintiff.

Another threshold issue is whether the district court should have abstained from deciding the company's case against McNeil under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), which forbids a federal court to enjoin a state criminal or quasi-criminal proceeding and certain other types of state enforcement proceeding. See also *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 490 (7th Cir. 1984). An unresolved question is whether a court can ever order abstention under the *Younger* doctrine when, as in this case (as, indeed, in *Younger* itself), the state has not asked for it. See discussion in *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1094-95 (7th Cir. 1984). We need not decide the question in this case, since in any event we do not think the doctrine is applicable.

The ruling by Superintendent McNeil which precipitated the company's lawsuit is a statement of intentions rather than a coercive order. His opinion says, "A demand for payment will issue, and the Department will take appropriate legal action to enforce said demand, absent voluntary compliance by the Employer." The wage payment act authorizes the state's Department of Labor "to make complaint in any court of competent jurisdiction of violations of this Act." Ill. Rev. Stat. ch. 48, ¶ 39m-11(c). But no such complaint has yet been filed. We may assume without having to decide that if such a complaint had been filed, *Younger* would have required

the district court to stay further proceedings in the present suit, thus forcing National Metalcrafters to make its argument for preemption by way of defense in the state court suit. The tentativeness of "assume without having to decide" is due to uncertainties about the precise range of civil actions to which the doctrine of *Younger* applies, see *W.C.M. Window Co. v. Bernardi, supra*, 730 F.2d at 490, and would disappear of course if a criminal action to enforce the wage payment act had been brought against National Metalcrafters; the act provides for criminal sanctions. See Ill. Rev. Stat. ch. 48, ¶ 39m-14. It would not matter whether the criminal action was brought before the federal case or after, provided that substantial proceedings had not yet taken place in the federal case. The application of the Younger doctrine does not depend on who gets to which courthouse first. *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975).

But with no state proceeding having been brought, National Metalcrafters has no remedy in state court against the alleged unconstitutional application of the wage payment act (alleged to be unconstitutional under the supremacy clause because in conflict with valid federal law). This clears out *Younger* as an obstacle to maintaining this suit but creates another obstacle—the possibility that the suit is unripe. If you violate a state law and nothing is done about it, this may indicate that the law is not being enforced and that you have no practical interest therefore in getting the law enjoined. But that is not this case. The state in a formal proceeding has authoritatively declared National Metalcrafters to be in violation of the statute, and while the state seems content to abide the results of National Metalcrafters' suit before bringing a criminal or other enforcement suit against the company, the workers who are the beneficiaries of the statute have by their counterclaim in the present suit demonstrated the practical consequences of Superintendent McNeil's ruling; for al-

though the counterclaim is based on federal law rather than the wage payment act, the workers have cited McNeil's ruling in support of their interpretation of the collective bargaining agreement. The considerations that led us to dismiss as unripe an attempt to enjoin threatened state enforcement proceedings in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252-53 (7th Cir. 1981), are thus absent. See also *Illinois v. General Elec. Co.*, 683 F.2d 206, 210-11 (7th Cir. 1982).

Coming to the merits of the appeal, we face first a question of judicial tactics: whether to consider all three of National Metalcrafters' grounds for preemption of the wage payment act or fewer than all three, as we can do if we find at least one to be valid. It might seem that one ground would always be enough, that to go on and discuss others would just dilute the force of our decision—there would be no holding, just alternative holdings. And a dubious holding bracketed as it were by sound holdings might cause mischief in the law, became the Supreme Court rarely grants review to decide an issue that is irrelevant to the outcome of the case. See Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S. Ct. Rev. 345, 372-73. The other side of the coin, however, is that piecemeal consideration of the grounds for appeal may result in successive remands that greatly prolong the litigation; an example from criminal law is discussed in *Reimnitz v. State's Attorney*, 761 F.2d 405 (7th Cir. 1985). Moreover, there is a benefit to resolving legal questions that are squarely presented, fully ripe, and fully argued: their resolution provides guidance to the community, and reduces legal uncertainty.

The issue we are most reluctant to decide is whether the Illinois wage payment act is preempted by ERISA. It is a difficult issue and if resolved in favor of preemption would have far-reaching consequences. It would apply not merely to companies that have collective bargain-

ing contracts but to all companies, even those without pension plans. It would subject all companies with vacation plans to the elaborate requirements that ERISA imposes on plans within its scope, would broadly displace the regulation of vacation benefits by state law, and could bring a host of trivial cases into the federal courts. We do not have to reach the issue of preemption under ERISA because, as we are about to see, the application of Illinois' wage payment act to this particular dispute is preempted by both the National Labor Relations Act and section 301 of the Taft-Hartley Act; and we shall not reach it, or drop the slightest hint about its correct resolution.

The issue of preemption by the federal labor statutes is focused by considering the particulars of the company's dispute with the union. A collective bargaining contract that expired on April 16, 1983, provided that "an eligible employee who has attained the length of service indicated below as of July 1, 1980, or any subsequent year during the term of this Agreement, shall receive a vacation corresponding to such length of service with vacation pay as shown in the following table . . . ." For example, a worker with 20 or more years of service would be entitled to four weeks of vacation and 9 percent "of the employee's straight-time earnings for the year period prior to May 1 of the vacation year." The contract also provided that "an employee who is terminated on or after January 1 but prior to July 1 of any year during the term of this Agreement shall receive a vacation payment at time of termination, or as soon thereafter as practicable," pro rated from the table. When the contract expired, the union called a strike. In July, with the strike still in progress, the company paid its workers, including those who were out on strike, vacation pay for the year ending May 1, 1983, computed however on a basis generally though not invariably less favorable to the workers than the table in the expired

contract. A worker with 20 years service was entitled to only three weeks of vacation, and 6.5 percent of his previous year's earnings (compared to four weeks and 9 percent under the expired contract); but a worker with only 3 years service did better under the new scheme than the old. The changes in vacation arrangements that the company thus unilaterally adopted were the same as it had proposed in unsuccessful negotiations with the union for a new contract to replace the one that had expired in April. Hundreds of employees complained to the Illinois Department of Labor, precipitating McNeil's ruling, which concluded that the company had violated the contract.

Section 301 of the Taft-Hartley Act creates a federal remedy for the breach of a collective bargaining agreement. The remedy is exclusive; no action to enforce such an agreement may be based on state law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345 (7th Cir. 1985). McNeil argues that section 301 is no bar to his enforcing the state's wage payment act against National Metalcrafters, and this for two reasons: that the wage payment act does not grant a remedy for breach of contract, but punishes conduct in the nature of conversion or fraud; and that he did not interpret the contract but merely applied an unequivocal term in it. Although the act is not entirely clear in this regard, McNeil interprets it as limited to cases where the employer's refusal to pay wages or benefits amounts to willful nonpayment of money due for past work and therefore already earned. If the employee's obligation is unclear or debatable the act is inapplicable—which, McNeil argues, prevents a collision with section 301.

But a determination that a contract is so clear as to make a breach willful (setting to one side the question of a breach that, while knowing, is not willful, because it is involuntary—e.g., the company just has run out of

money) *is* an interpretation of the contract, as the facts of this case make clear. The contract expired before July 1, which was when vacation pay became due under its terms for the work year that had ended on May 1. The issue before McNeil was the effect of expiration. The company conceded that the workers were entitled to some vacation pay but argued that the proper rate of pay was that in effect on July 1—the generally less generous rate that the company had adopted after the collective bargaining contract had expired. McNeil, noting that any worker who had been terminated between January 1 and April 16 would have been entitled to vacation pay pro rated according to the table in the contract, while if the company were right a worker who had continued to work after that would be entitled to vacation pay at a different (and generally lower) rate, thought that "no reasonable person . . . could have read the 1980 Contract and expected such an illogical outcome, in which one earns more by failing to complete the vacation year."

This is an overstatement. If the company had adopted a vacation plan more favorable to the workers than the plan in the old contract, as for a variety of reasons it might have done (the new plan *was* more favorable, to younger workers), the interpretation for which the company was contending would not result in so "illogical" an outcome. More important, McNeil was reading into the contract an implicit provision vesting the vacation pay rights granted in the contract as of the date when a worker complied with the preconditions laid down in the contract, even if that date followed the expiration of the contract. Remember that the contract made the rate of vacation pay depend on one's earnings in the year ending May 1, which fell after the contract had expired. Nevertheless under McNeil's view any worker still on the payroll on July 1 was entitled to vacation pay on the terms in the collective bargaining contract, even though the contract had expired not only before July 1 but before May

1, when the work year ended. The contract contains no provision regarding the vesting of rights in its last year; McNeil plugged the gap.

His interpretation of the contract may have been correct, an issue we do not want to prejudge. But it was an interpretation. The company was not violating what any fool would know was an express obligation of the contract. It was exploiting a gap in the language of the contract. A court or arbitrator might fill the gap just as McNeil did, by interpreting the silence of the contract as pregnant in light of other provisions; the arbitrator's decision that we upheld in *Ethyl Corp v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985), a factually analogous case, was such an interpretation; but it can be made only in a proceeding under section 301. If there is an arguable contract dispute, and there is here, the power to resolve it is confined to such proceedings.

In the usual case in which section 301 is alleged to preempt state law, the state law claim is not a contract claim but a tort claim, and the issue is whether nonetheless "resolution of [the] state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1916 (1985). See also our recent decision in *Gibson v. A T & T Technologies, Inc.*, No. 85-1815 (7th Cir. Jan. 27, 1986). The only basis of the state-law claim in this case is that the company broke its contract to grant vacation pay of a certain amount. No state law required that any vacation pay be given or fixed the rate of such pay if given. This is not a case like *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), where state law required employers who bought health insurance for their employees to insist on certain terms in the policies. The state law created an entitlement that was independent of the collective bargaining contract. No issue of contract interpretation could have arisen, and preemption by vir-

tue of section 301 was not even argued. The only thing the state law at issue in this case requires is that the employer honor his contract. To decide whether he has done so requires interpreting the contract, unless, perhaps, the particular contractual provision is so clear as to preclude all possible dispute over its meaning, but it is not.

This case is not like *Whelan's Inc. v. Kansas Dept. of Human Resources*, 235 Kan. 425, 681 P.2d 621 (1984), where the state's wage payment act required as in this case that vacation benefits be paid at the wage rates in force when the benefits were earned but there was no dispute over when they had been earned. Again no argument of preemption based on section 301 was made, since there was no dispute over the meaning of the parties' contract.

Although *Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279, 282 n. 5 (3d Cir. 1983), rejected contentions that Pennsylvania's wage payment act was preempted by either by ERISA or the Taft-Hartley Act, the court's entire discussion of the issue consists of the statement, "we find that these contentions are without merit." The particulars of the contentions and the grounds of the court's action are inscrutable

These cases, moreover, are placed under a shadow by the Supreme Court's recent decision in *Lueck*. A worker sued his employer and the insurance company that administered the provisions of the collective bargaining agreement relating to disability benefits, charging a refusal, in bad faith, to honor his claim for benefits. Although the tort of refusing in bad faith to honor an insurance claim requires "a breach of contract which is not even 'fairly debatable,'" 105 S. Ct. at 1915 n. 13, this was not enough to avoid the preemption of the tort by section 301. One might have thought that if the breach was indeed not fairly debatable, there could be no possible conflict between state and federal principles for interpreting contracts. The Court in *Lueck* disagreed,

perhaps because one person's incontestable contract reading is another's fairly debatable one. The present case is a much stronger one for preemption, as the question whether the employer broke the contract is "fairly debatable."

McNeil argues that National Metalcrafters has waived its argument based on section 301 by failing to make it in the district court. National Metalcrafters did argue that the wage payment act was preempted by federal labor law, but the only specific law it mentioned was the National Labor Relations Act; and an issue is not properly reserved by perfunctory invocation of a vast and variegated body of law—by pointing to Title 29 of the United States Code and inviting the district judge to thumb through it for some ground on which the party extending the invitation can win. We have refused to consider a ground for reversal that the appellant had raised but that had been "presented in so perfunctory and underdeveloped a manner in his brief that we shall not consider it." *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984); see also *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). A district judge is likewise entitled to disregard a ground raised but not pressed.

But like almost every other principle of law, that which adjures courts not to reverse on grounds (other than grounds going to the court's subject-matter jurisdiction) not pressed below has its exceptions. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 384 (7th Cir. 1984); *Capitol Indemnity Corp. v. Keller*, 717 F.2d 324, 329 (7th Cir. 1983); *New York, N.H. & H.R. Co. v. Reconstruction Finance Corp.*, 180 F.2d 241, 244 (2d Cir. 1950) (L. Hand, J.). Even those of us who are most emphatic in our opposition to reversing decisions on the basis of grounds not properly preserved by the appellant recognize that our opposition must yield "in exceptional circumstances," *Tom v. Heckler*, 779 F.2d 1250, 1259 (7th Cir. 1985) (dissent-

ing opinion), as where the ground is based on strongly held policies demarcating the spheres of competence of state and federal government. *Younger v. Harris, supra,* which involved interference by a federal district court with an essential state function, that of prosecuting criminal offenders, was such a case, and the Supreme Court reversed although the appellant had not asked for reversal on that ground. See 401 U.S. at 40; *Schlesinger v. Councilman,* 420 U.S. 738, 743 (1975). Section 301 expresses a strongly held policy in favor of applying uniform federal principles to the interpretation of collective bargaining contracts. This policy reflects the national commitment to limiting state regulation of labor relations that grows out of the history of hostility in some states to the labor movement.

Of course there is a difference between a court's staying its hand and a court's reaching out to forbid another branch of government from acting; so we do not suggest that the case for overlooking the appellant's failure properly to preserve one of its grounds for appeal is the same here as in *Younger.* There are, however, other features of this case which mitigate the gravity of the appellant's oversight. The issue of preemption by section 301 has been fully briefed and argued on appeal. It does not require for its resolution any factual determinations, so there is no question of the company's having derived some advantage from bypassing the district court or of our being placed at a disadvantage in reviewing the issue by the absence of a determination on it in that court. As we are about to see, the issue is logically as well as factually intertwined with the issue that National Metalcrafters did raise of preemption by the National Labor Relations Act. *Lueck,* which provides in our view decisive support for finding preemption under section 301 in this case, came down after the district court's decision in this case, and the timing provides at least a partial excuse for National Metalcrafters' failure to press the section 301 issue in that court. Finally, National Metalcrafters did raise

the issue in the district court, if inadequately; and since it was complaining that McNeil had improperly as well as incorrectly interpreted the collective bargaining agreement, using principles of state rather than federal law, the existence of an issue of preemption under section 301 fairly shouted from the facts. Cf. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112 n. 11 (5th Cir. 1985); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 (2d Cir. 1984); *Texas v. United States*, 730 F.2d 339, 358 n. 35 (5th Cir. 1984). Considering the circumstances, we cannot see what there is to be gained from refusing to decide the issue.

We could stop here, having found that McNeil's ruling is made unenforceable by section 301 of the Taft-Hartley Act; but the other ground for preemption, that based on the National Labor Relations Act and raised and decided in the district court, is so closely related to the section 301 ground that we shall press on. A company's repudiation of a term in its collective bargaining agreement is likely to raise questions under both section 301 and the NLRA; and just as section 301 is exclusive in its sphere, so conduct that may be within the scope of the NLRA, which is to say conduct that the National Labor Relations Board might hold either to be forbidden by the Act or privileged by the Act, may not be regulated under state law. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor & Human Relations*, 750 F.2d 608, 610 (7th Cir. 1984), prob. juris. noted, 105 S. Ct. 2356 (1985). Passed against a background of unhappy experience with state regulation of labor relations, and embodying a delicate balance between the rights of employers and of unions, the Act has been interpreted to forbid the states to attempt to regulate labor relations in the industries subject to it.

The union originally thought that the company's action in unilaterally implementing its altered vacation pay plan indeed violated the National Labor Relations Act, for it

filed a complaint (later withdrawn) with the Labor Board. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), forbids employers to interfere with union activities; and here the altered plan was put into effect during a strike. Section 8(a)(5), 29 U.S.C. § 158(a)(5), forbids the employer to refuse to bargain in good faith with a union representing its employees; and one form that such a refusal can take is for the employer to change the terms or conditions of employment unilaterally, before having bargained to a deadlock ("impasse," in the accepted jargon). If it has bargained to a deadlock it can make such changes, provided that they are within the scope of its proposals during the bargaining period, see, e.g., *Western Newspaper Publishing Co.*, 269 N.L.R.B. 355 (1984), and cases cited there, and are not motivated by hostility to the union, which would bring section 8(a)(1) into play. See generally *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979).

When the contract in this case expired, the union called a strike, and the company then put the new vacation arrangements into effect. If, as the company argues, it was effectuating the very proposal which it had made to the union and about which it had bargained to an impasse, its conduct was protected. See, e.g., *Western Newspaper Publishing Co., supra*, 269 N.L.R.B. at 356-57; *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 472 (3d Cir. 1983). "Impasse" signifies that the parties have been unable to come to terms, after honestly trying to do so. If before this happens the company unilaterally changes the terms or conditions of work, it is bypassing the bargaining process, and therefore is not bargaining in good faith. And if after an apparent impasse the company puts into effect a change that it had not laid on the bargaining table, this implies that the company had held something back from the negotiations, so again it could not have been bargaining in good faith. See the lucid discussion of these matters in *NLRB v. Katz*, 369 U.S. 736 (1962). It may seem that if, as McNeil found, the company was depriv-

ing its employees of vested rights created by a collective bargaining contract, it could not have been implementing the company's collective bargaining proposal, because that was a proposal for changing the next collective bargaining agreement. But all that this would prove, if it were true, was that the company really had violated the National Labor Relations Act, in which event state regulation would be preempted. And it might not be true. A union might decide to surrender some vested rights of its members if, for example, that was necessary in order to keep the company from shutting down a plant and throwing all the workers out of work; so a proposal for such a "give back" is not necessarily inconsistent with serious bargaining.

Another possibility is that the company was trying to send the striking workers a message that the strike was futile, since at best it could lead to a new collective bargaining contract and the company had just shown that the last contract was just a scrap of paper. This would violate both sections 8(a)(1) and 8(a)(5), as it would undermine both the union and the bargaining process. See *Robins Door & Sash Co.*, 260 N.L.R.B. 659, 662 (1982); *Stokely-Van Camp, Inc.*, 259 N.L.R.B. 961 (1982), rev'd, 722 F.2d 1324 (7th Cir. 1983). (We reversed *Stokely-Van Camp* because we found that the Labor Board's order was not supported by substantial evidence; the principle was not disturbed.). This would be especially clear if the company was trying to place financial pressure on the strikers to return to work by giving them less vacation pay than they had earned. The strikers may have been counting on that pay to tide them over the period of the strike. It may not be an accident that the new vacation plan benefits younger at the expense of older workers; the latter tend to be stronger union adherents. The company may have been playing divide and conquer.

Against all this McNeil argues that the wage payment act, like a minimum wage or maximum hours law, does

no more than set certain minimum terms of employment; and the enforcement of those terms, being required by state law, simply is outside the regulatory domain of the Labor Board. The National Labor Relations Act sets the ground rules for economic warfare; but if a state withdraws a part of the employment relationship from that warfare, by requiring a mandatory term in every employment contract, as in the *Metropolitan Life* case discussed earlier, that part is no longer within the Board's purview.

The problem with this argument is that the wage payment act does not require any terms in the employment contract. It just requires the employer to stick to the terms it has negotiated with the employee or the employee's bargaining representative. It is precisely because vacation time and vacation pay are negotiable that the company, by (arguably) flouting the vacation provision of the old contract, can send a signal to the workers that it is no use authorizing a union to negotiate with it. The state has simply created a new remedy for violations of collective bargaining agreements. Nor is the statute a public benefits program that happens to benefit labor over management, such as the statute in *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 59 (1979), which entitled striking workers to unemployment benefits. When applied as in this case to a disputed term of a collective bargaining contract whose expiration precipitated a strike, the wage payment act injects state officials into labor disputes over which the National Labor Relations Board has exclusive jurisdiction.

McNeil also appeals to a line of cases in which state regulation of conduct within the scope of the National Labor Relations Act has been held not to be preempted because the regulation "touches interests deeply rooted in local feeling and responsibility." *Belknap v. Hale*, 463 U.S. 491, 498 (1983). If an employer hires goons to beat up picketers, this violates the Act, but it also is a

common law battery, and the state is not forbidden to provide the usual tort remedy for it. The enforcement of laws of general applicability that may happen to be violated during strikes as during other disputes is unlikely to disrupt the Labor Board's regulation of labor relations. The wage payment act, however, as applied in this case (an important qualification, of which more shortly), in effect authorizes a state official to inject himself into the bargaining process and threaten the company with a fine for making a unilateral change in the terms of employment in violation of an expired collective bargaining agreement. The potential for interference with the system of collective bargaining is too great to allow us to place this case within the "local feeling and responsibility" exception.

Thus the application of Illinois' wage payment act to this dispute over vacation pay is doubly preempted: by section 301 of the Taft-Hartley Act and by section 8 of the National Labor Relations Act. This conclusion does not leave employees who are in the position of the intervenors in this case, or for that matter these intervenors, without remedy. If an employer violates a collective bargaining contract, there is a remedy under section 301 (if he does not violate it, there is not—but the whole premise of McNeil's action is that the company violated the contract); and the counterclaim, which remains pending in the district court, seeks it. If the employer commits an unfair labor practice, there is a public remedy under the National Labor Relations Act; the remedies under that Act and under section 301 are not mutually exclusive. There just is no state remedy.

Do not exaggerate the scope of our holding. We are not striking down the wage payment act. The act can continue to be applied in employment settings—the majority—where there is no collective bargaining contract and no labor dispute within the purview of the National Labor Relations Board. And even if there is a contract,

if its meaning is so clear that the company cannot in good faith dispute the workers' vested rights to benefits under it, the state will not be prevented from enforcing the wage payment act by section 301 of the Taft Hartley Act, as interpreted in this opinion (*Lueck* may go further); and unless the dispute arises as it did in this case out of the collective bargaining negotiations, not by the National Labor Relations Act either. Even if it does arise out of such negotiations, if the refusal to honor the contract is in such patent bad faith as to partake of the wrongfulness associated with some of the traditional common law intentional torts, conceivably the application of the wage payment act would not be preempted though this is not an issue we need decide in this case.

The judgment is reversed with directions to enter judgment for National Metalcrafters on its complaint against McNeil.

A true copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit